Alternatives to detention for asylum seekers and people in return procedures

For asylum and return (i.e. expulsion) procedures to be implemented effectively, people need to be at the disposal of the authorities so that any measure requiring their presence can be taken without delay. To achieve this, EU Member States may decide to hold people in closed facilities. Less intrusive measures, which are usually referred to as ***alternatives to detention****, reduce the risk that deprivation of liberty is resorted to excessively.*

In light of the significant number of asylum seekers and migrants reaching the EU's external borders and moving onward to other EU Member States, there is a danger that deprivation of liberty may be resorted to excessively and in cases where it is not necessary. With this compilation of legal instruments and other resources, FRA seeks to provide guidance to policy makers and practitioners on the use of non-custodial measures for asylum seekers and people in return procedures.

According to EU law, as well as Article 5 of the European Convention of Human Rights, deprivation of liberty for immigration-related reasons can only be used as a measure of last resort. An assessment needs to be made in each individual case to determine whether all the preconditions required to prevent arbitrary detention are fulfilled. Under Article 8 of the Reception Conditions Directive 2013/33/EU and Article 15 of the Return Directive 2008/115/EC, detention must not be used when less intrusive measures are sufficient to achieve the legitimate objective pursued.

Most of the wide array of alternatives to detention imply some restrictions on freedom of movement and/or other fundamental rights. Any restrictions to these rights must be in conformity with Article 52 (1) of the EU Charter of Fundamental Rights. This means that limitations must be provided for by law, must genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, respect the essence of the right, and be proportionate. Alternatives to detention must, therefore, be distinguished from unconditional release from detention or unrestricted placement in open facilities.

The alternatives, many of which can be used in combination with each other, can be broadly grouped under the following categories:

Obligation to surrender passports or travel documents

This obligation may be imposed alone or together with other alternatives, such as the duty to stay in a particular location or area. It is a soft measure that essentially serves to ensure that valid identity and travel documents are not lost or destroyed during the time required to prepare the return and removal process.

Residence restrictions

Such restrictions impose the duty of remaining at a particular address or residing within a specific geographical area, often combined with regular reporting requirements. The designated places can be open or semi-open facilities run by the government or NGOs, as well as hotels, hostels or private addresses. The regime imposed can vary, but people generally have

to be present at the designated location at certain times, while absences are usually only allowed with a well-founded justification.

Release on bail and provision of sureties by third parties

In the context of criminal law, it is not uncommon to allow the release of a detained person on condition of bail, which will be forfeited if the person does not report to the authorities. Release based on financial guarantees is infrequently used in asylum and pre-removal proceedings, partly because it is assumed that many asylum seekers or third-country nationals in return procedures would not have the necessary means to put up bail.

Regular reporting to the authorities

This alternative obliges people to report to the police or immigration authorities at regular intervals, and is one of the more frequent alternatives to detention found in national legislation. Reporting duties on a daily, bi-weekly, weekly or even less frequent basis may also be imposed as an additional requirement to the obligation to reside in a specified area or location.

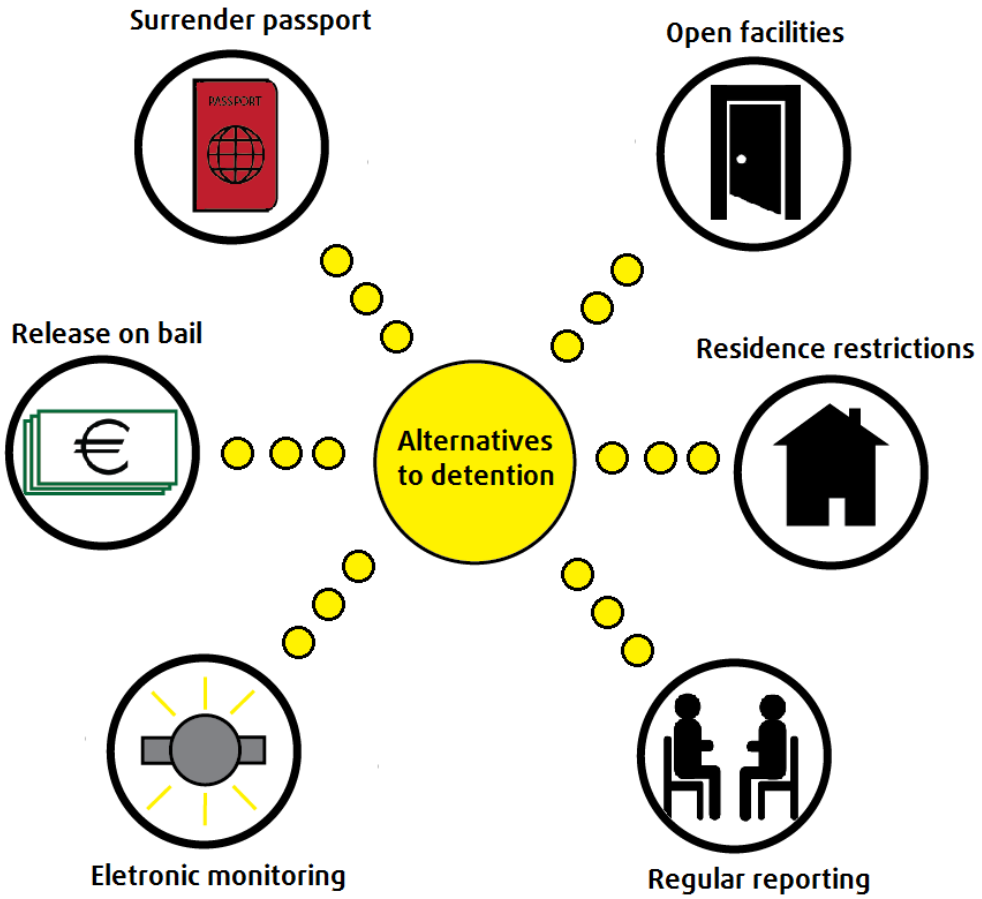
Placement in open facilities with caseworker support

This is an innovative alternative to detention that combines classical social work with time spent at designated places. Asylum seekers or people in return procedures are placed in open facilities and provided with individual coaches or counsellors to inform and advise them about their situation and options. This form of alternative was established following evidence that compliance with a return decision depends on the level of trust the person affected by the decision has in the authorities of the host country. Such trust is created through individual counselling and contacts with external actors, such as NGOs.

Electronic monitoring

Electronic monitoring or tagging is primarily used in the context of criminal law. Its use as a substitute for immigration detention is limited. Electronic monitoring is the most intrusive of the various alternatives to detention, as it substantially interferes with a person's right to privacy, restricts freedom of movement and can have a negative impact on their dignity. It can also lead to discrimination through the potential association of people wearing an electronic device with criminals.

Figure 1: Types of alternatives to detention



Source: FRA (2015)

Significant attention has been devoted to alternatives to immigration detention in recent years. This has resulted both in a great deal of comparative research and in the developments of tools and other guidance to promote the use of alternatives. This compilation is aimed at policy makers and practitioners entrusted with the task of promoting the use of alternatives to detention and seeks to facilitate the usage of existing materials. It presents various instruments and research material, together with the general human rights and EU legal framework. The first section covers the international framework that safeguards the right to liberty, while those that follow focus specifically on alternatives to detention. The compilation sets out selected:

- instruments on the right to liberty
- non-binding United Nations instruments on alternatives to detention
- non-binding Council of Europe instruments on alternatives to detention
- European Union law provisions relating to alternatives to detention
- case law from the European Court of Human Rights, the Court of Justice of the EU and the United Nations Human Rights Committee on alternatives to detention
- recently developed tools
- research publications.

The selected instruments are presented by category, beginning with legal instruments (binding and non-binding), and then continuing to case law, expert guidelines and research papers. The

left column of each table lists the documents in question with an embedded hyperlink to the full text. The right column reproduces key excerpts from these documents, with additional explanations in *italics* where relevant. A short introduction precedes each table.

Using alternatives to detention benefits both the state and migrants, as on the one hand they are more cost-effective and on the other they are less intrusive and more respectful of fundamental right than deprivation of liberty. Although virtually all EU Member States provide for the possibility of alternatives to detention (current reforms in Malta are expected to introduce fully-fledged alternatives in the near future), they are still too little applied and when they are, it is primarily in cases involving particularly vulnerable people. Several EU Member States do not yet collect statistics on alternatives to detention, which makes it difficult to assess the extent to which they are used in reality.

Compilation of key resources to promote the use of alternatives to immigration detention in practice

1. Right to liberty: selected instruments

Human rights law affirms that no one should be subject to *arbitrary* arrest or detention. The right to liberty is set out in a number of international human rights documents, beginning with the Universal Declaration of Human Rights. This is also reflected in regional human rights instruments, as well as in the Charter of Fundamental Rights of the European Union.

Instrument	Main provisions
International human rights instruments	
Universal Declaration of Human Rights	Art. 3 – Right to life, liberty and security Art. 9 – Prohibition of arbitrary detention
International Covenant on Civil and Political Rights (ICCPR)	Art. 9 – Right to life, liberty and security; prohibition of arbitrary detention
Convention on the Rights of the Child (CRC)	Art. 37(b) – Prohibition of children's unlawful or arbitrary detention
Convention on the Rights of Persons with Disabilities (CRPD)	Art. 14 – Liberty and security of the person
Convention Relating to the Status of Refugees	Article 31 – Refugees unlawfully in the country of refuge (*prohibition of penalties*)
Regional human rights instruments	
European Convention on Human Rights (ECHR)	Art. 5 – Right to liberty and security
American Convention on Human Rights	Art. 7 – Right to personal liberty
African Charter on Human and Peoples' Rights	Art. 6 – Right to personal liberty and protection from arbitrary arrest
European Union law	
Charter of Fundamental Rights of the European Union	Art. 6 – Right to liberty and security

2. Alternatives to detention: selected instruments

This section presents the applicable legal standards relating to alternatives to detention and provides an overview of alternatives, as well as the procedural guarantees that must be in place for them to be used.

2.1. Selected non-binding United Nations (UN) instruments relating to alternatives to detention

The UN recommends careful consideration before detaining asylum seekers, refugees or migrants in an irregular situation to determine whether deprivation of liberty is necessary and proportionate. Detention is only allowed for the shortest appropriate period of time. Generally, detention should be a measure of last resort and Member States should ensure that alternatives to detention are available in law and implemented in practice. Children should not be detained purely for immigration-related reasons.

The United Nations have developed a set of basic principles to promote the use of non-custodial measures for people subject to alternatives to imprisonment in the criminal field. These rules contain important safeguards on access to rights and remedies that are largely applicable to the immigration field as well.

According to the UN Special Rapporteur on the human rights of migrants, alternatives have proved to be considerably less expensive than detention, not only in terms of direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services or migrant integration.

Instrument	Key text
United Nations General Assembly	
Protection of migrants: resolution adopted by the General Assembly, 3 April 2013, A/RES/67/172	**4.** […] (*a*) Calls upon all States to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention and, where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention; […] (*d*) Also notes with appreciation the successful implementation by some States of alternative measures to detention in cases of undocumented migration as a practice that deserves consideration by all States;
United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), 14 December 1991, A/RES/45/110	**1.1** The present Standard Minimum Rules provide a set of basic principles to promote the use of noncustodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.
United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the	*The Bangkok Rules complement the Tokyo rules (above) by displaying standards specifically addressing the needs of women in the criminal judicial system. Section III focuses on non-custodial measures both for pre-trial detention and sentencing post-conviction. The rules specifically require to always take into account the best interests of any children*

Bangkok Rules), 6 October 2010, A/C.3/65/L.5	*involved and to provide for the special circumstances and particular vulnerabilities of specific groups, including women who need protection, girls in criminal justice system and victims of human trafficking Rules 64, 65 and 66 respectively focus on "pregnant women and women with dependent children," "juvenile female offenders" and "foreign nationals."* **Rule 57** […] Gender-specific options for diversionary measures and pre-trial and sentencing alternatives shall be developed within Member States' legal systems, taking account of the history of victimization of many women offenders and their caretaking responsibilities. **Rule 58** […] Alternative ways of managing women who commit offences, such as diversionary measures and retrial and sentencing alternatives, shall be implemented wherever appropriate and possible
United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990, A/RES/45/113	**17.** Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. […]
General comments by UN treaty bodies	
UN Human Rights Committee, *General comment No. 35: Article 9, Liberty and security of person*, 30 October 2014, CCPR/C/GC/35	**18.** Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic revaluation and judicial review. […] Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.
UN Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and*	**61.** In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where

Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6	detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.
Executive Committee of the High Commissioner's Programme (ExCom)	
ExCom Conclusions No. 85 (XLIX), 9 October 1998	**(dd)** Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.
UN Working Group on Arbitrary Detention	
Report of the Working Group on Arbitrary Detention, 18 January 2010, A/HRC/13/30	**60.** The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort.
Report of the Working Group on Arbitrary Detention, 16 February 2009, A/HRC/10/21	**75.** The Working Group feels bound to reiterate that detention shall be the last resort and permissible only for the shortest period of time, and that alternatives to detention shall be sought whenever possible, all of which particularly concern the deprivation of liberty applied to asylum-seekers, refugees and irregular migrants. Furthermore, the Working Group feels that immigrants in irregular situations should not be qualified or treated as criminals and viewed only from the perspective of national security.
Report of the Working Group on Arbitrary Detention, 10 January 2008, A/HRC/7/4	[T]he Working Group identifies several shortcomings it has observed in connection with the detention of [irregular] immigrants and asylum-seekers. The Working Group recalls the obligation of States to consider alternatives to administrative custody from which foreigners can benefit. **53.** The Working Group would further recall the obligation of States to consider alternatives to administrative custody from which the alien can benefit in accordance with Guarantee 13 [*see below*] as developed by the Working Group in its legal opinion on the situation regarding immigrants and asylum-seekers. […] **80.** Regarding detention of asylum-seekers and illegal immigrants, the Working Group addresses the following recommendations to States: […] (b) The Working Group requests States to use detention of asylum-seekers and illegal immigrants only as a last resort, and encourages them to explore alternatives to detention, such as supervised release,

	release on bail, designated residence or regular reporting to authorities.
Report of the Working Group on Arbitrary Detention, 18 December 1998, E/CN.4/1999/63	*The Commission on Human Rights requested the Working Group to pay attention in the reports received to the alleged arbitrary detention of immigrants and asylum-seekers. In order to do so, the Working Group developed some guidelines and 14 guarantees meant to help determine the arbitrariness of the detention depending on whether or not the alien is able to enjoy all or some of the guarantees. Guarantee 13 addresses alternative to detention:* **Guarantee 13**: Possibility for the alien to benefit from alternatives to administrative custody.
Special Rapporteur on the human rights of migrants	
Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, A/HRC/23/46	**48.** It should of course be noted that, in fact, the Return Directive stipulates that detention should be a measure of last resort. Yet, in practice, few viable alternatives to detention appear to be explored by the European Union institutionally and by European Union member States individually. In the countries visited the Special Rapporteur witnessed an almost complete absence of readily implementable wide-scale alternatives to detention, including for children. General recommendations: […] **92.** Promote viable alternatives to detention, and not insist on further entrenching detention as a migration control mechanism through support for expanded networks of detention centres. Detention should always be a measure of last resort, and children should never be detained.
Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 2 April 2012, A/HRC/20/24	**48.** […] Research has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and assistance. The alternatives have also proved to be considerably less expensive than detention, not only in direct costs but also when it comes to longer-term costs associated with detention, such as the impact on health services, integration problems and other social challenges. **53.** In the Special Rapporteur's view, the obligation to always consider alternatives to detention (non-custodial measures) before resorting to detention should be established by law. Detailed guidelines and proper training should be developed for judges and other State officials, such as police, border and immigration officers, in order to ensure a systematic application of non-custodial measures instead of detention. Non-custodial measures should be subject to legal review, and migrants who are subject to non-custodial measures should have access to legal counsel. When considering alternatives to detention, States must take full account of individual circumstances and those with particular vulnerabilities, including pregnant women, children, victims of trafficking, victims of torture, older persons and persons with disabilities. The least intrusive and restrictive measure possible in the individual case should be applied. Legislation should establish a sliding scale of measures from least to most restrictive, allowing for an analysis

	of proportionality and necessity for every measure. Some non-custodial measures may be so restrictive, either by themselves or in combination with other measures, that they amount to alternative forms of detention, instead of alternatives to detention. When considering whether the measures applied amount to detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed. **56.** Alternatives to detention may be defined as "any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country [*International Detention Coalition, October 2015 p. 2*]." *Paragraphs **57 to 65** explain different type of alternatives to detention:* *57. Registration with the authorities* *58. Deposit of documents* *59. Release on bail, bond, or under surety/guarantor* *60. Periodic reporting to State officials* *61. Case management/supervised release* *62. Designated residence* *63. Electronic monitoring* *64. Home curfew/house arrest* *65. Voluntary return programmes* *Paragraph 66 suggests safeguards States should respect for the success of alternatives to detention: provide clear information about the measure and access to legal advice; issue identification documents; ensure adequate standard of living and consider allowing access to the labour market; avoid policies that restrict the access to housing, basic welfare and health.* **68.** Detention for immigration purposes should never be mandatory or automatic. According to international human rights standards, it should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available. Governments have an obligation to establish a presumption in favour of liberty in national law, first consider alternative non-custodial measures, proceed to an individual assessment and choose the least intrusive or restrictive measure.
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	
Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 March 2015, A/HRC/28/68	**85**. With regard to the vulnerability of children deprived of their liberty and policy reform, the Special Rapporteur calls upon all States: (m) To ensure that immigration detention is never used as a penalty or punishment of migrant children, including for irregular entry or presence, and to provide alternative measures to detention that promote the care and well-being of the child;

2.2. Selected non-binding Council of Europe instruments relating to alternatives to detention

The Committee of Ministers and the Parliamentary Assembly of the Council of Europe have repeatedly emphasised the need for states to consider alternative and non-custodial measures, based on individual assessments, before resorting to detention. The Parliamentary Assembly stresses that children should never be detained for immigration purposes.

Instrument	Key text
Committee of Ministers, Twenty Guidelines on Forced Return, 4 May 2005	**Guideline 6.** Conditions under which detention may be ordered 1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.
Committee of Ministers, *Recommendation Rec(2003)5 on measures of detention of asylum-seekers*, 16 April 2003	**6.** Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention.
Committee of Ministers, *Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation*, 30 September 1999	**1.** Deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate.
Parliamentary Assembly of the Council of Europe, *Resolution 2020 – The alternatives to immigration detention of children,* 3 October 2014	**9.** […] The Assembly therefore calls on member States to: […] 9.7. adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved; 9.8. provide necessary resources in order to develop alternatives to the detention of migrant children; 9.9. seek to develop and implement non-custodial, community-based alternatives to detention programmes for children and their families, using the "Child-sensitive Community Assessment and Placement (CCAP) Model"; 9.10. raise the awareness of all public officials, including the police, prosecutors and judges dealing with migration matters, of international human rights standards, by emphasising the rights of children and the alternatives to detention; 9.11. share best practices on the alternatives to the detention of migrant children in all member States; 9.12. encourage collaboration between governments of member States, the Council of Europe, United Nations agencies,

	intergovernmental organisations and civil society organisations to end child immigration detention and implement non-custodial, community-based alternatives to detention for children and their families.

2.3. Selected European Union law on alternatives to detention

EU Law establishes specific limitations on the use of detention for asylum seekers and people in return procedures. Deprivation of liberty must remain a measure of last resort in all circumstances, while detention decisions must be based on individual assessments. Deprivation of liberty is not allowed if other, less coercive measures would be sufficient to achieve the same aim.

Legislation	Key text
Dublin Regulation (EU) No 604/2013	**Article 28** – Detention 2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.
Asylum Procedures Directive 2013/32/EU	**Article 26** – Detention 1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.
Reception Conditions Directive 2013/33/EU	**Article 8** – Detention 2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively. 4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.
Return Directive 2008/115/EC	**Article 15** – Detention 1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. **Article 17** – Detention of minors and families 1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
Return Handbook	**Obligation to provide for alternatives to detention:** Article 15(1) must be interpreted as requiring each Member State to provide in its national legislation for alternatives to detention; this is also consistent with the terms of Recital 16 to the Directive ("*..if application of less coercive measures would not be sufficient*"). In *El Dridi*, C-61/11, para 39, the [CJEU] confirmed: "*..it follows from recital 16 in the preamble to that directive and from the*

	wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him."
Regulation (EU) No 516/2014 (establishing the Asylum, Migration and Integration Fund)	**Article 5** – Reception and asylum systems […] As regards reception conditions and asylum procedures, the Fund shall support, in particular, the following actions focusing on the categories of persons referred to in the first subparagraph of this paragraph: (g) the establishment, development and improvement of alternative measures to detention. **Article 11** – Measures accompanying return procedures […]In this context, the Fund shall support, in particular, the following actions focusing on the categories of persons referred to in the first subparagraph: (a) the introduction, development and improvement of alternative measures to detention […]

3. Alternatives to detention: selected case law

The European Court of Human Rights (ECtHR) has found in a number of cases that Member States have violated the European Convention on Human Rights through arbitrary detention where less coercive measures could have been used. The following table presents selected judgements from the ECtHR, citing the relevant paragraphs (the text in *italics* indicates a FRA translation into English when the judgement is only available in French), and thereafter quotes two judgements by the Court of Justice of the EU and four communications by the United Nations Human Rights Committee (HRC).

Case	Relevant excerpt from the judgement
European Court of Human Rights (ECtHR)	
Louled Massoud v. Malta, No. 24340/08, 27 July 2010	**68.** Moreover, the Court finds it hard to conceive that in a small island like Malta, where escape by sea without endangering one's life is unlikely and fleeing by air is subject to strict control, the authorities could not have had at their disposal measures other than the applicant's protracted detention to secure an eventual removal in the absence of any immediate prospect of his expulsion. **69.** In the light of the above, the Court has grave doubts as to whether the grounds for the applicant's detention – action taken with a view to his deportation – remained valid for the whole period of his detention, namely, more than eighteen months following the rejection of his asylum claim, owing to the probable lack of a realistic prospect of his expulsion and the possible failure of the domestic authorities to conduct the proceedings with due diligence.
Rahimi v. Greece, No. 8687/08, 5 April 2011	**109.** Yet, in this present case, by ordering the claimant's detention the national authorities did not in any way look into the question of his best interest as a minor. Moreover, they did not examine whether the claimant's placement in the Pagani detention center was a measure of last resort and if they could substitute a less drastic measure so as to ensure his deportation. These factors raise doubts in the eyes of the Court, as to the good faith of the authorities during the implementation of the detention measure.
Yoh-Ekale Mwanje v. Belgium, No. 10486/10, 20 December 2011	**124.** […] In spite of this situation, the authorities did not consider a less severe measure, such as a temporary residence permit, so as to safeguard the public interest of detention and avoid the continued detention of the claimant for seven additional weeks. **125**. In those circumstances, the Court fails to see the connection between the detention of the claimant and the aim pursued by the Government to remove him from the territory.
Popov v. France, Nos. 39472/07 and 39474/07, 19 January 2012	**119.** […] The Court finds, as in the above-cited case of *Muskhadzhivyeva and Others*, that, in spite of the fact that they were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children's particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no

	alternative was available. The Court thus finds that the French system did not sufficiently protect their right to liberty.
Court of Justice of the European Union (CJEU)	
Hassen El Dridi, alias Soufi Karim, C-61/11 PPU, 28 April 2011	**39.** In that regard, it follows from recital 16 in the preamble to that directive [*Return Directive 2008/115/EC*] and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.
Bashir Mohamed Ali Mahdi, C-146/14 PPU, 5 June 2014	**64.** Consequently, the answer to question 1(b) and (c) is that Article 15(3) and (6) of Directive 2008/115 [*Return Directive*] must be interpreted as meaning that the 'supervision' that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.
United Nations Human Rights Committee (HRC)	
A. v. Australia, CCPR/C/59/D/560/1993, HRC, 3 April 1997	**9.2** On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. […]
C. v. Australia, CCPR/C/76/D/900/1999, HRC, 13 November 2002	**8.2** […] In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention (para. 4.28 et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial

	review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.
Saed Shams and Others v. Australia, CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004, HRC, 11 September 2007	**7.2** […] While the State party has advanced general reasons to justify the authors' detention, apart from the statement that some of them, without stating who, attempted to escape, the Committee observes that the State party has not advanced grounds particular to the authors' cases which would justify their continued detention for such prolonged periods. In particular, the State party has not demonstrated that, in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends.
F.K.A.G. v. Australia, Communication No. 2094/2011: Views adopted by the Committee at its 108th session (8 – 26 July 2013), 20 August 2013, CCPR/C/108/D/2094/2011	**9.3** The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law. Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

Alternatives to detention: selected tools

A number of tools and initiatives provide guidance on how to develop alternatives to detention for asylum seekers and migrants in an irregular situation. UNHCR and the International Detention Coalition (IDC), a network of civil society organisations, have developed guidelines, while the Odysseus Network has put together a training module on alternatives to detention.

Document	Content
UNHCR, *Options Paper 2: Options for governments on open reception and alternatives to detention*, April 2015	Provides good practices from several countries on the reception of asylum-seekers and the use of open reception and alternatives to detention.
UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, April 2015	Provides guiding principles for policy and decision makers and lists good practices from various countries on the reception of unaccompanied children, on families with children, and on the implementation of alternatives to detention.
International Commission of Jurists (ICJ), *Updated Practitioners Guide on Migration and International Human Rights Law*, 2 October 2014, Practitioners Guide No. 6	Chapter 4, "Migrants in detention" (p. 175 s.) explains how international human rights standards apply to detention for the purposes of immigration. It describes how the right to liberty is enshrined in the main human rights instruments and the approach to alternatives to detention of the CCPR, ECtHR and Inter-American Court of Human Rights.
Odysseus Network, *Module on alternatives to detention in the EU*, 2014	"The training module was designed as a tool available for those interested in conducting awareness-raising/training sessions on alternatives to detention in the EU context." It "takes the form of an interactive power point presentation which can be modified by the partners according to their national context."
UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012	"These Guidelines reflect the state of international law relating to detention – on immigration-related grounds – of asylum-seekers and other persons seeking international protection." According to guideline 4.3, "alternatives to detention need to be considered." Annex A outlines a range of alternatives.
International Detention Coalition (IDC), *Captured Childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and Irregular migrant children affected by Immigration detention*, 2012	The policy document "tells the stories of children who have been detained in immigration detention and proposes a model that can prevent the future detention of others." It promotes the use of alternatives to detention and highlights the positive impacts of using alternatives.
IDC, *Legal Framework and standards relating to the detention of refugees, asylum*	The IDC presents its core position on immigration detention into a ten standards brief, and the international legal provisions supporting those standards. Standard 6 refers to alternatives to detention.

seekers and migrant, A guide, Melbourne, 2011	
IDC, *There are Alternatives: A handbook for preventing unnecessary immigration detention*, October 2015	The aim of the research is to "identify and describe any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country." Methodology: "review of existing literature; international online survey of 88 participants in 28 countries; international field work in nine countries including in-depth interviews with 57 participants and eight site visits. Participants included representatives of governments, non-governmental organisations, international human rights organisations and key agencies from the United Nations."
IDC, *Put a CAP on immigration detention, An NGO advocacy guide*, 1 January 2011	The guide explores five major activities that can be undertaken "to prevent unnecessary detention and to ensure community-based alternatives for refugees, asylum seekers and migrants: Analyse, Network, Prioritise, Advocate and Connect."

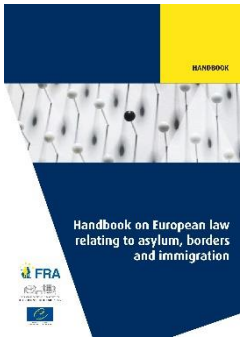
5. Selected research publications

Although many Member States provide for alternatives to detention, these are seldom used and usually only in the case of particularly vulnerable groups, such as families with children and unaccompanied minors. In addition to traditional forms of alternatives to detention, more innovative projects have been piloted that involve a combination of social work and counselling with accommodation at designated places, such as open houses. The studies below provide further information on the practical experiences of EU Member States in implementing alternatives to immigration detention.

Document	Content
Odysseus Network, *Alternatives to Immigration and asylum detention in the EU*, January 2015	The first part of the report covers the legal framework for alternatives to detention, with references to law and literature. The second part focuses on the implementation of A2D in Austria, Belgium, Lithuania, Slovenia, Sweden and the United Kingdom. It explores in great detail the EUMS' obligations under the recast Reception Conditions Directive and analyses the issue of access to rights for individuals placed under A2D. The national reports of the six countries covered are also available on the Odysseus Network website.
European Migration Network (EMN), *Synthesis Report – The Use of Detention and Alternatives to Detention in the Context of Immigration Policies*, November 2014	"The study aimed to identify similarities, differences and best practices with regard to the use of detention and alternatives to detention in the context of (Member) States' immigration policies." It was prepared on the basis of national contributions of 26 EMN National Contact Points. "Special attention was given to detention and/or alternatives to detention in respect of vulnerable persons such as minors, families with children, pregnant women and persons with special needs." The country reports are also available for AT, BE, BG, HR, CY, CZ, FI, DE, GR, HU, LV, LT, LU, NL, SK, SI, ES, SE, NO and PL.
Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199 final, 28 March 2014	Table 3 (p. 16) provides the legal and practical application of alternatives to detention in 27 EU Member States.
UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2018*, 2014	The strategy aims to make the detention of asylum-seekers an exceptional rather than routine practice. To ensure that alternatives to detention are available in law and implemented in practice is the 2nd of the three main goal of the strategy.
Refugee Studies Centre, *Forced Migration Review No. 44 - Detention, alternatives to detention, and deportation*, September 2013	This issue contains 10 articles related to alternatives to detention. The authors highlight the benefits of A2D and offer a presentation of its implementation in several countries such as Australia, Belgium, Sweden, the UK and the USA.
UNHCR, *Building Empirical Research into Alternatives to*	Based on qualitative research in Toronto and Geneva, the study aims to "bring the perspectives of asylum-seekers, refugees

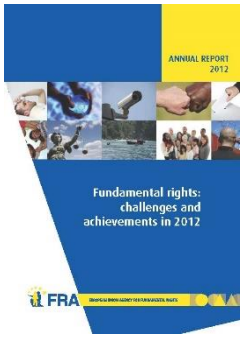
Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva, June 2013, PPLA/2013/02	and other migrants on the workings of alternatives to immigration detention," in order to understand how to best design A2D.
Jesuit Refugee Service (JRS) Europe, *JRS Europe Policy Position on Alternatives to Detention*, 4 October 2012	"The purpose of this policy position is to orientate and guide JRS Europe in its reflections and analyses of alternatives to detention, as well as to equip JRS Europe with the means to advocate for the implementation of alternatives in law and practice."
Matrix evidence, *An economic analysis of alternatives to long-term detention*, Final report, September 2012	"The objective of this research was to determine the cost savings associated with the timely release of migrants pending removal who are currently detained for long periods only to be released back into the community."
JRS Europe, *From Deprivation to Liberty: Alternatives to detention in Belgium, Germany and the United Kingdom*, December 2011	The study intends to examine A2D in Belgium, Germany and the UK through the perspective of the migrants. The three countries have been chosen for their distinct and identifiable alternatives to detention.
UNHCR, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1	The first part of the study outlines the general international legal framework relating to deprivations of liberty. The second part describes and examines some alternatives to detention, by types of alternatives, and through state practice. It tries to identify some shared elements that could be replicated in other national contexts. A number of risks associated with A2D if they are not implemented carefully are also highlighted.
European Union Agency for Fundamental Rights (FRA), *Detention of third-country nationals in return procedures*, November 2010.	The report examines law and practice in the EU 27 on the deprivation of liberty of irregular migrants pending their removal against the applicable international human rights law framework. Section 5 emphasizes the duty to examine A2D, based in law or deriving from case law, and provides an overview of alternative measures found in national legislation.
Amnesty International, *Irregular migrants and asylum-seekers: Alternatives to immigration detention*, 1 April 2009, POL 33/001/2009	"Section I sets out the obligation of states to provide alternatives to immigration detention. Section II establishes how those alternatives are to be applied, while Section III discusses the use of particular alternatives […]. Finally, a brief conclusion summarizes key findings and recommendations for campaigning and advocacy."

Further information:



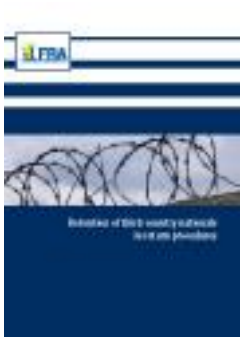
Handbook on European law relating to asylum, borders and immigration
June 2014

This handbook presents EU legislation and the body of case law by the CJEU and the ECtHR in an accessible way. It is intended for legal practitioners, judges, prosecutors, immigration officials and NGOs in the EU and Council of Europe Member States.



Fundamental rights: challenges and achievements in 2012 - Annual report 2013
June 2014

The FRA Annual report 2012 looks at fundamental rights-related developments in asylum, migration and integration, border control and visa policy. Section 1.3.3 provides an update on alternatives to detention.



Detention of third country nationals in return procedures
November 2010

This report deals with deprivation of liberty of migrants in an irregular situation pending return. Detention of a person constitutes a major interference with personal liberty. Any deprivation of liberty must therefore respect the safeguards which have been established to prevent unlawful and arbitrary detention.

- Refworld page on Detention : http://www.refworld.org/detention.html
- Jesuit Refugee Service Europe page on alternatives to detention: http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=309&Itemid=262
- International Detention Coalition page on alternatives to detention: http://idcoalition.org/issues/alternatives-to-detention/
- Council of Europe: Committee for the Prevention of Torture, *The CPT standards*, CPT/Inf/E (2002) 1 - Rev. 2013: http://www.cpt.coe.int/en/docsstandards.htm